

## Environmental Protection Agency

## § 78.10

raised, or that the materiality of the new evidence or issue could not have reasonably been anticipated, prior to the close of the public comment period or the period for submitting a claim of error notification.

(b) If an evidentiary hearing is granted, no evidence shall be filed or presented on questions of law or policy or on matters not subject to challenge in the evidentiary hearing.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997]

### § 78.6 Action on petition for administrative review.

(a) If no evidentiary hearing concerning the petition for review is requested or is to be held, the Environmental Appeals Board will issue an order under § 78.20(c) of this part.

(b)(1) The Environmental Appeals Board may grant a request for an evidentiary hearing, or schedule an evidentiary hearing *sua sponte*, if the Environmental Appeals Board finds that there are disputed issues of fact material to contested portions of the decision and determines, in its discretion, that an opportunity for direct- and cross-examination of witnesses may be necessary in order to resolve these factual issues.

(2) To the extent the Environmental Appeals Board grants a request for an evidentiary hearing, in whole or in part, it will:

(i) Identify the portions of the decision that have been contested, and the disputed factual issues that have been raised by the petitioner with regard to which the evidentiary hearing has been granted; and

(ii) Refer the disputed factual issues to the Chief Administrative Law Judge for decision and, in its discretion, may also refer all or a portion of the remaining legal, policy, or factual issues to the Chief Administrative Law Judge for decision.

(3)(i) After issues are referred to the Chief Administrative Law Judge, he or she will designate an Administrative Law Judge as Presiding Officer to conduct the evidentiary hearing.

(ii) Notwithstanding paragraph (b)(3)(i) of this section, if all parties waive in writing their right to have an Administrative Law Judge designated

as the Presiding Officer, the Administrator may designate a lawyer permanently or temporarily employed by EPA and without any prior connection with the proceeding to serve as Presiding Officer.

### § 78.7 [Reserved]

### § 78.8 Consolidation and severance of appeals proceedings.

(a) The Environmental Appeals Board or Presiding Officer has the discretion to consolidate, in whole or in part, two or more proceedings under this part whenever it appears that a joint proceeding on any or all of the matters at issue in the proceedings will be in the interest of justice, will expedite or simplify consideration of the issues, and will not prejudice any party. Consolidation of proceedings under this paragraph (a) will not affect the right of any party to raise issues that might have been raised had there been no consolidation.

(b) The Environmental Appeals Board or Presiding Officer has the discretion to sever issues or parties from a proceeding under this part whenever it appears that separate proceedings will be in the interest of justice, will expedite or simplify consideration of the issues, and will not prejudice any party.

### § 78.9 Notice of the filing of petition for administrative review.

The Administrator will publish in the FEDERAL REGISTER a notice stating that a petition for administrative review of a decision of the Administrator has been filed and specifying any request in the petition for an evidentiary hearing.

### § 78.10 *Ex parte* communications during pendency of a hearing.

(a)(1) No party or interested person outside EPA, representative of a party or interested person, or member of the EPA trial staff shall make, or knowingly cause to be made, to any member of the decisional body an *ex parte* communication on the merits of a proceeding under this part.

(2) No member of the decisional body shall make, or knowingly cause to be made, to any party or interested person outside EPA, representative of a